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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-424

CITY OF CRYSTAL CITY,
Petitioner,

versus

DEL MONTE CORPORATION d/b/a
DEL MONTE FOODS, INC.,
Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

LAW OFFICES OF PAT MALONEY

By PAT MALONEY and
JESSE GAMEZ
1000 Alamo National Building
San Antonio, Texas 78205

Attorney for Petitioner

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IN THE
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CITY OF CRYSTAL CITY,

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versus

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REFERENCE TO OFFICIAL REPORTS OF THE OPINIONS DELIVERED IN THE COURT BELOW

The opinion now before this Honorable Court is cited: *City of Crystal City v. Del Monte Corporation.* It is not yet published in the reporter system.

GROUNDS ON WHICH JURISDICTION OF SUPREME COURT IS INVOKED

Date of Judgment: May 24, 1972

Date of Order Overruling Motion for Rehearing: June 26, 1972

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The provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari:

The Honorable Fifth Circuit has decided an important state question in a way in conflict with applicable state law.

QUESTIONS PRESENTED FOR REVIEW

1. Is an ordinance and contract between a municipality and a corporation, granting the corporation immunity from annexation and taxation void and ineffectual, when:

   a. The City Attorney negotiating such ordinance and contract is on retainer to the corporation; and

   b. A City Councilman voting for same is a senior employee of such corporation?

2. Must the complaining city actually prove *mala fides* in such contract?

3. Must the city actually prove "personal pecuniary interest" on the part of the municipal officers in question, or does the dual capacity *ipso facto* render the ordinance and contract void?

THE STATUTES AND ORDINANCES WHICH THE CASE INVOLVES

TEX. R. CIV. STAT. ANN. Art. 988

No member of the city council shall hold any other employment or office under the city government while

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he is a member of said council, unless herein otherwise provided. No member of the city council, or any other officer of the corporation, shall be directly or indirectly interested in any work, business or contract, the expense, price of consideration of which is paid from the city treasury, or by an assessment levied by an ordinance or resolution of the city council, nor be the surety of any person having a contract, work or business with said city, for the performance of which security may be required, nor be the surety on the official bond of any city officer. Acts 1875, p. 154; G.L. vol. 8, p. 526.

TEX. PENAL CODE ANN. Art. 371

Any officer of any county or of any city or town who shall contract directly or indirectly, or become in any way interested in any contract for the purchase of any draft or order on the treasury of such county, city or town, or for any jury certificate of any other debt, claim or demand for which said county, city or town may or can in any event be made liable, shall be fined not less than ten nor more than twenty times the amount of the order, draft, jury certificate, debt, claim or liability so purchased or contracted for. Within the term "officer," is included ex-officers until they have made a final settlement of their official accounts. Acts. 1874, p. 47.

TEX. PENAL CODE ANN. Art. 373

If any officer of any county, or of any city or town shall become in any manner pecuniarily interested in

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any contracts made by such county, city or town, through its agents, or otherwise, for the construction or repair of any bridge, road, street, alley or house, or any other work undertaken by such county, city or town, or shall become interested in any bid or proposal for such work or in the purchase or sale of anything made for or on account of such county, city or town, or who shall contract for or receive any money or property, or the representative of either, or any emolument or advantage whatsoever in consideration of such bid, proposal, contract, purchase or sale, he shall be fined not less than fifty nor more than five hundred dollars. Acts 1874, p. 48.

CHARTER, CITY OF CRYSTAL CITY, TEXAS, Sec. 130

No member of the council or any officer or employee of the city shall have a financial interest, direct or indirect or by reason of ownership or stock in any corporation, in any contract or in the sale to the city or to a contractor supplying the city, of any land or rights of interest in any land, material, supplies or service.

STATEMENT OF THE CASE

In 1963 the then governing body of City of Crystal City, Texas, contracted with Del Monte Corporation, agreeing not to annex Del Monte's plant for seven years. It was subsequently discovered that Mr. R. A. Taylor, City Attorney, who prepared the contract and the enabling ordinance, was at the time receiving a monthly retainer fee from Del Monte (then known as California Packing Corporation).

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In 1970, a new seven-year contract was negotiated. The same city attorney — still on retainer from Del Monte — prepared the ordinance and gave the city council his official legal opinion that the contract was valid and legal.

At the time of the 1970 contract and ordinance, Mr. C. O. Crawford, Jr., was a member of the five man city council, and he voted for adoption of same, even though he was a shift foreman for Del Monte, in charge of more than four hundred Del Monte employees, and Del Monte was his "bread and butter."

Petitioner instituted suit in the United States District Court for the Western District of Texas, seeking declaratory judgment that the aforesaid contracts and ordinances were void, because of conflict of interests.

Both parties moved for summary judgment. The Trial Court entered an order declaring the 1970 contract and ordinance "at least voidable and probably void." Del Monte appealed to the United States Court of Appeals for the Fifth Circuit, which court reversed and remanded, holding: "The question of whether or not Crawford had an interest in the contract is ... a fact to be determined on the merits."

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The action is between citizens of different states, and amount in controversy exceeds $10,000.00. 28 U.S.C.A. 1332; 28 F.C.A. 1332.

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ARGUMENT AND AUTHORITIES

The United States Court of Appeals for the Fifth Circuit recognizes the fact C. O. Crawford, Jr., the city councilman and shift foreman, did not recuse himself from voting in favor of the ordinance which was valuable to his company. The city attorney prior to adoption of the ordinances, officially held the respective ordinances were legal. He recommended passage as in the best interest of the city — this in spite of his regular retainer fee from Del Monte! Petitioner respectfully contends the 1970 contract between the City of Crystal City, Texas, and Del Monte Corporation is void *ab initio*. The City of Crystal City was entitled to the unbiased judgment of every member of its council in passing upon the contracts and the enabling ordinances. The honorable Fifth Circuit has reversed the case for a trial on the merits, stating Petitioner must prove and show to the satisfaction of the Court and jury a direct or indirect personally pecuniary interest. Obviously, this burden is onerous and the learned Appellate Court has imposed a very difficult, if not insurmountable, blockade before the aggrieved municipality.

In a very recent and closely analogous Texas case, the very point now raised by Del Monte was presented to the Court of Civil Appeals for the Fourth Supreme Judicial District. *Delta Electric Construction Company v. City of San Antonio*, 437 S.W.2d 602 (Tex. Civ. App. — San Antonio 1969, writ ref'd n.r.e.). In that opinion, Justice Klingerman reviews the applicable penal and civil statutes proscribing conflict of interest,

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and at page 608 of the opinion effectively refutes the position now advanced by Del Monte, viz:

> "Delta asserts that since it was stipulated that Delta's president did not in any way influence the award of such contract, no conflict of interest existed. *The fact that no influence was exercised is not determinative of whether the contract was violative of the conflict of interest ordinance and statutes.* (Emphasis supplied.)

In the case at bar, it is obvious and undisputed that the contract and ordinance not to annex Del Monte properties to the City of Crystal City, Texas, was a valuable property right indeed. Annexation means ad valorem taxes. A contract not to annex for seven years means no ad valorem taxes for that period — a very valuable inducement to the corporation and a substantial loss of income to the municipality.

A nearly identical situation was presented in *Stockton Plumbing and Supply Company v. Wheeler*, 68 Cal. App. 592, 229 P. 1020, where a sheet metal foreman of the company receiving bid was also a member of the City Council. The question on appeal was whether or not the contract was valid. The Appellate Court had no hesitancy in declaring the contract void. The contention was made that the City Councilman, as a foreman, was not "interested" in the contract within the provisions of statutes strikingly similar to those now before this Honorable Court. The court held the foreman was sufficiently interested. Appellee feels the lan-

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guage of the Appellate Court in *Wheeler* is so eloquent, well-reasoned, and profound as to justify the following direct quotation from the case:

> "The personal interest of an officer in a contract made by him in his official capacity may be indirect only, still such interest would be sufficient to taint the contract with illegality. If his interest in the contract is such as would tend in any degree to influence him in making the contract, then the instrument is void because contrary to public policy, the policy of the law being that a public officer in the discharge of his duties as such should be absolutely free from any influence other than that which may directly grow out of the obligations that he owes to the public at large. In this case, Charlesworth was the sheet metal foreman of the petitioner's establishment and the contract proposed to be awarded to the petitioner was connected directly with that department of the petitioner's business. Under these circumstances, it would be exceedingly strange if Charlesworth were not, to a considerable extent, desirous of the awarding of the contract to his employer. Indeed, we think it cannot well be denied that, abstractly speaking, the interest which Charlesworth had in the petitioner's business would be sufficient to invalidate any contract made by a public officer in which he had a similar interest. In a sense, Charlesworth, to the extent of his authority as foreman of the sheet metal department of the petition-

er, is the latter's agent. While it may truly be said that he would not derive direct pecuniary gain from the contract, he certainly would indirectly be so benefited, since upon the success of petitioner's business financially primarily depends the continued tenure of his position and the compensation which he receives for performing the service required of him as the foreman of the department referred to."

C. O. Crawford, Jr., testified by deposition he had worked for Del Monte Corporation for 25 years; he was in charge of one of two shifts in the plant (deposition, page 5); and he was fourth in command at Del Monte plant (deposition, page 19).

This witness Crawford testified by oral deposition that the fact he was an employee might be persuasive in his affirmative vote for the ordinance, or in his words: "It just possibly might." (deposition, page 22, line 21).

In an early court decision, *Texas Anchor Fence Co. v. City of San Antonio*, 71 S.W. 301, (Tex. Civ. App. — San Antonio 1902, no writ), we find this review of fact and law:

"The city had no money, but desired a fence. The alderman agreed that, if the city purchased the fence, he would pay for it, and would look to the city for repayment. Clearly, he was interested in a contract for the purchase of a claim for which the city could be

held liable. It may be that the alderman desired to accommodate the city, and that it was an act of kindness on his part to furnish the money; but *the law does not look to the motives actuating the purchase by an officer of claims against the city, but denounces it and punishes it regardless of the motives.* It is, in the eyes of the law, better that the city should go without improvements than that it should have its officers, who should be in a position to act in the service of the city *untrammeled by selfish motives and unencumbered by private interests.* The law has, in the strongest terms, condemned any connection on the part of an officer with any of the indebtedness of a city; and when he violates its terms, he cannot claim any of the rights or immunities of an innocent purchaser, but his purchase of such indebtedness must be held, on grounds of public policy, illegal and void ..." (Emphasis supplied).

It is not necessary to ascertain whether or not C. O. Crawford, Jr., was actually moved by motives of self-interest. Whether or not the record shows he was or was not is irrelevant, and cannot change the situation. His personal pecuniary interest exists as a matter of law. He was, without question, employed by Del Monte in a position of responsibility and influence in the community. Naturally, his allegiance would be to his employer of a quarter century. The law will not permit a public official to pass upon contracts and ordinances which are detrimental to his municipal duties

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and beneficial to his private employment. The contract and ordinance in question was a valuable property right to Del Monte; it exempted that corporation from municipal ad valorem taxes for a period of seven years and deprived the city of such taxes.

It was the finding of the learned Trial Court that the combination of shift foreman-city council member and city attorney-retained attorney was such as to require the contract and ordinance to be set aside.

"It is the existence of such interest which is decisive, and not the actual effect or influence, if any, of the interest; if there is a potential conflict, the contract is invalid. Moreover, the good faith of the parties, and the reasonableness of the consideration involved in the transaction may be wholly immaterial." *McQuillin, Municipal Corporations*, Vol. 10 (revised), Sec. 29.27, p. 470.

SUMMARY AND CONCLUSION

The opinion of the Honorable Fifth Circuit, if allowed to stand, will foster self-dealing upon the part of municipal employees who may hold responsible positions in private enterprise; with this opinion, the burden of proof is no longer upon the employee but upon the City. The City must, according to this case, actually prove personal pecuniary interest. The City must, according to this opinion, prove a direct conflict of interests. The Fifth Circuit has erroneously stated the law as it exists in Texas.

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WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Honorable Supreme Court grant certiorari, review this case and in all things reverse the opinion of the United States Court of Appeals for the Fifth Circuit and affirm the judgment of the learned Trial Court.

Respectfully submitted,

LAW OFFICES OF PAT MALONEY

PAT MALONEY

JACK PASQUAL

JESSE GAMEZ

CERTIFICATE OF SERVICE

I certify three copies of the above brief have been served upon counsel for respondent.

PAT MALONEY

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-3144

CITY OF CRYSTAL CITY,
Plaintiff-Appellee,

versus

DEL MONTE CORPORATION d/b/a DEL MONTE FOODS, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

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(May 24, 1972)

Before AINSWORTH, GODBOLD and MORGAN, Circuit Judges.

AINSWORTH, Circuit Judge: Both parties, the City of Crystal City, Texas, plaintiff, and the Del Monte Corporation, defendant, have appealed from an order of the District Court granting in part and denying in part cross-motions for summary judgments in this diversity case. The requirements of Fed. R. Civ. P. 56(c)

for summary adjudication have not been met — th material facts are very much in dispute, and at thi stage of the proceedings the record indicates tha neither party is entitled to judgment as a matter o law.

The City of Crystal City, Texas, is an incorporate city in Zavala County, Texas. Del Monte Corporation a New York corporation, owns and operates a foo canning and processing plant within one mile of th city limits of Crystal City. In 1963, Crystal City entere into an agreement with Del Monte's predecesso whereby the City designated the property occupied b the plant as an industrial district and agreed that fo a period of seven years it would not annex such prop erty. In 1970, when the contract terminated, the Cit and Del Monte entered into a similar seven-year agree ment. An ordinance approving the agreement wa passed by the City Council.

This action was begun by Crystal City with the filin of a complaint in District Court for a declaratory judg ment that the 1970 agreement and supporting ordi nance were void under Texas State law, both civi and penal.[1] The basis of the allegation was that a mem

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[1]Crystal City cites the following Texas statutes in support of it contentions:

TEX. R. CIV. STAT. ANN, Art 988

No member of the city council shall hold any other employment or office under the city government until he is a member of said council, unless herein otherwise provided. No member of the city council, or any other officer of the corporation, shall be directly or indirectly interested in any work, business or con-

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ber of the City Council who was also an employee of Del Monte, and therefore had a personal interest in the contract, wrongfully voted for its passage.

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tract, the expense, price of consideration of which is paid from the city treasury, or by an assessment levied by an ordinance or resolution of the city council, nor by the surety of any person having a contract, work or business with said city, for the performance of which security may be required, nor be the surety on the official bond of any city officer. Acts 1875, p. 154; G. L. vol 8, p. 526.

TEX. PENAL CODE ANN. Art. 373

If any officer of any county, or of any city or town shall become in any manner pecuniarily interested in any contracts made by such county, city or town, through its agents, or otherwise, for the construction or repair of any bridge, road, street, alley or house or any other work undertaken by such county, city or town, or shall become interested in any bid or proposal for such work or in the purchase or sale of anything made for or on account of such county, city or town, or who shall contract for or receive any money or property, or the representative of either, or any emolument or advantage whatsoever in consideration of such bid, proposal, contract, purchase or sale, he shall be fined not less than fifty nor more than five hundred dollars. Acts 1874, p.48.

TEX. PENAL CODE ANN. Art 371

Any Officer of any county or of any city or town who shall contract directly or indirectly, or become in any way interested in any contract for the purchase of any draft or order on the treasure of such county, city or town, or for any jury certificate of any other debt, claim or demand for which said county, city or town may or can in any event be made liable, shall be fined not less than ten nor more than twenty times the amount of the order draft, jury certificate, debt, claim or liability so purchased or contracted for. Within the term "officer," is included ex-officers until they have made a final settlement of their official accounts. Acts. 1874, p. 47.

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Del Monte answered, denying illegality of the contract and ordinance, and the City thereafter filed its motion for summary judgment, incorporating therewith depositions taken on its behalf of C. Q. Crawford, Jr., former Councilman for the City, and R. A. Taylor, former City Attorney, and affidavits of the mayor and mayor pro-tem to the effect that at the Council meeting at which the 1970 ordinance was passed exempting the Del Monte area from annexation, Crawford had said that Del Monte had been his "bread and butter." Crawford, in his deposition, denied the statement.

Subsequently, the City filed an amended complaint seeking a declaration that the 1963 contract as well as the 1970 contract and the corresponding ordinances were void. The basis of this allegation was that at the time of the execution of the 1963 and 1970 contracts, the City Attorney for Crystal City, R. A. Taylor, was receiving a yearly legal retainer fee from Del Monte, thereby creating a further conflict of interest. In addition to the declaratory relief sought, the City, alleging fraud, demanded actual and exemplary damages plus attorney's fees.

After several procedural skirmishes, including an initial denial by the District Court of the City's motion for summary judgment, the granting of Del Monte's motion for a preliminary injunction to restrain the City from annexing the said property, and the filing by Del Monte of a motion for summary judgment, the parties, by pretrial order, stipulated the following facts:

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"At the time of the 1963 agreement and ordinance, R. A. Taylor, Jr. was City Attorney; at that time R. A. Taylor, Jr. was on a monthly retainer to California Packing Corporation, predecessor of Defendant; R. A. Taylor did not enter into any of the negotiations on behalf of either Plaintiff or Defendant to consummate the agreement of 1963; upon instructions of the then city manager, R. A. Taylor, Jr. drafted the ordinance whereby the City approved the agreement; C. Q. Crawford, Jr. was not then a city councilman; at the time of the passage of the 1970 ordinance approving the agreement on behalf of the city, R. A. Taylor Jr. was once again the City Attorney; he did not engage in negotiations for the renewal of the agreement between Plaintiff and Defendant; upon instruction of the then City Manager, he drafted the ordinance whereby the Plaintiff approved the agreement; in both 1963 and 1970, Taylor gave his opinion to the City Council that the respective Ordinances were legal and passage would be in the best interest of the City; C. Q. Crawford, Jr. was a shift foreman of Defendant at such time; C. Q. Crawford was a member of the city council when the 1970 ordinance was passed; the council voted four to zero to pass the ordinance, the mayor being absent from the meeting, and Crawford was present and voted for the ordinance."

Based on this stipulation, the District Court entered an order on the parties' motions for summary judg-

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ment, denying all damages, setting aside the injunction, finding the 1970 contract to be "at least voidable and probably void" but upholding the validity of the 1963 contract. The order appears in the margin.[2]

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[2] ORDER

"On this 23rd day of June, 1971 came on to be considered the Motions of the Plaintiff and Defendant for Summary Judgment in the above styled case.

"This case was presented to the Court by the parties hereto on an agreed Stipulation of Facts upon which the Court makes the following findings:

1. The fact that R. A. Taylor was City Attorney in 1963 when the seven year contract was initially entered into did not involve such a conflict of interest by and between R. A. Taylor (who was also retained as counsel by Del Monte at $250.00 per year) as would constitute a conflict in loyalties that would vitiate the contract. There is no showing that Mr. Taylor's representation of the City at the time that the contract was approved and his advocating that it was beneficial to the City would constitute such a conflict of interest or so influence the City Councilmen in approving the contract as to render it either void or voidable. The Court, therefore, finds the 1963 Contract to be valid.
2. As to the 1970 Contract and the 1970 City Ordinance, the Court finds that the presence of C. O. Crawford, Jr. and R. A. Taylor together in their respective capacities as City Councilman and City Attorney rendered the contract at least voidable and probably void, and the injunction against annexing the land upon which Del Monte is located should be set aside.
3. The City is authorized to assess taxes for the appropriate periods from and after the date of the signing of the 1970 Contract.
4. No bad faith or fraud was shown by plaintiff in the case which would permit recovery of attorneys' fees.

"Based on the stipulated facts and the above findings the Court makes the following disposition of the said motions:

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Del Monte contends that the stipulated facts are insufficient to warrant a determination that the 1970 ordinance and contract were invalid because of any conflict of interest. We agree. The District Court found that City Attorney Taylor's activities in 1963 neither constituted a conflict of interest nor created any influence on the City which would render the 1963 contract invalid. However, the District Court also found that the 1970 contract was void or voidable because of the combined participation of Taylor and Councilman Crawford. We are unable to determine which activities of Taylor, when combined with those of Crawford's, were considered objectionable by the Trial Court. According to the stipulated facts, Taylor acted

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"It is hereby ORDERED, ADJUDGED AND DECREED that

1. As to the matters under the 1963 Contract, the Motion for Summary Judgment of the Defendant is GRANTED.
2. As to the Motion for Summary Judgment of the Plaintiff, The City of Crystal City, the motion is partially GRANTED insofar as to set aside the said injunction and to permit the plaintiff to set aside the 1970 Contract and Ordinance authorizing same and to allow the annexation of the defendant's property for tax purposes for all appropriate periods from and after the date of the 1970 Contract and the City Ordinance.

"The following claims are in all things DENIED:

1. The claim of Crystal City for actual damages as well as exemplary damages for the alleged fraud on the part of the defendant, i. e. the claim for $189,000 actual damages is denied; the claim for $378,000 punitive and exemplary damages is denied.
2. The claim of Crystal City for $150,000 in attorneys' fees is denied.

"It is FURTHER ORDERED that all Court costs be adjudged against the defendant."

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in the same manner and performed the same service in 1970 as he did in 1963. If, as the District Court found, Taylor's activities in 1963 were not such as to render the 1963 contract invalid, why would the identical services in 1970 assist in rendering that contract invalid? In regard to Crawford's activities in 1970, the stipulation shows only that he was a member of the City Council and an employee of Del Monte at the time the 1970 ordinance was passed unanimously on his vote and the vote of three other members, the mayor being absent. These facts taken alone do not support a conclusion under the cited Texas statutory law or the Texas case law that the contract and ordinance were void or voidable. No authority is cited for the proposition that the mere fact that an officer of a city is also an employee of a corporation with which the city has contracted is sufficient of itself to invalidate that contract. We cannot determine the basis of the District Court's conclusions. We likewise have no way of knowing whether the Court considered the depositions or affidavits in the record. The order indicates that the District Judge's disposition of the motions was made on the stipulated facts alone, but these facts are insufficent to support his conclusions.

The statutes and ordinance relied on by the City as prohibiting the type of conflicting interest alleged to exist here, refer variously to a direct or indirect interest (Art. 988, Vernon's Annotated Texas Statutes); a pecuniary interest (Art. 373, Texas Penal Code); a direct or indirect financial interest (Section 130 of the City of Crystal City Charter); an interest (Art. 371 Texas Penal Code). The Texas appellate courts have

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interpreted the conflict of interest statutes as requiring that the prohibited interest by the city official be a "personal pecuniary interest" in order to invalidate a contract. See *City of Edinburg v. Ellis*, Texas Comm'n. App., 1933, 59 S. W. 2d 99, in which the Court said:

> "It has long been the public policy of this state to prohibit officers of a city from having a *personal pecuniary interest* in contracts with the city and this policy is specifically expressed in both the penal and civil statutes [citing Article 373, Penal Code, and Article 988, R.C.S. 1925]." [Emphasis supplied.]

In *Delta Electric Const. Co. v. City of San Antonio*, Tex. App. 1969, 437 S. W. 2d 602, the Court considered the mere existence of a conflicting interest (apart from the effect or influence of that interest) as determinative in invalidating a contract between the City of San Antonio and a corporation whose president was an officer of the City. However, in discussing the type of interest prohibited it adopted the language of *Edinburg v. Ellis* supra, referring to a "personal pecuniary interest," 437 S. W. 2d at 609.

Whether or not Crawford had any interest — direct, indirect, personal or pecuniary — in the contract is a material fact disputed by the parties. Since the existence of such an interest is not stipulated, the Court was not justified in finding that the 1970 contract was "at least voidable and probably void." The City contends, however, that Crawford's personal pecuniary

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interest exists as a matter of law. This contention is contrary to the holding in *City of Edinburg v. Ellis*, supra, in which the plaintiff had sought to recover on an open account growing out of a contract between himself and the defendant City. In an attempt to avoid the contract, the City of Edinburg alleged fraudulent collusion between plaintiff and a city official. The Trial Court peremptorily instructed the jury to return a verdict for plaintiff. The Court of Civil Appeals (San Antonio) affirmed. However, the Texas Commission of Appeals (Section A) reversed and remanded, holding that the issue of interest in a contract, having been raised, was an issue of fact to be determined. Similarly, we hold that the question of whether or not Crawford had an interest in the contract is likewise a fact to be determined on the merits.[3]

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[3]The same is true in regard to the disputed issue of whether or not Taylor had an interest in either or both contracts sufficient to invalidate the contracts. A hearing on the merits is necessary to clarify this issue. The City contends that the District Court erred in failing to find the 1963 contract void upon the allegedly undisputed facts showing that in 1963 Taylor was both City Attorney and the recipient of a retainer fee from Del Monte, that he advocated the 1963 contract and ordinance which not only saved Del Monte ad valorem taxes for seven years but deprived the City of these taxes for that period. This, however, is not a correct statement of the facts stipulated. While it may be assumed that in the absence of annexation of property there is likewise no taxation, it is equally obvious from other non-stipulated facts contained in exhibits attached to the City's pleadings that the agreement not to annex resulted in benefits to the City. For example, the corporation is a major source of employment to local citizens; large sums of money are spent by Del Monte in the City for raw materials, services and supplies; Del Monte provides the City emergency access to its private water supply. It is thus apparent that the parties disagree even in regard to what facts are stipulated.

We have held that summary judgment is proper only "when the truth is clear, where the basic facts are undisputed and the parties are not in disagreement regarding material factual inferences that may be properly drawn from such facts. *Cole v. Chevron Chemical Co.*, 427 F. 2d 390 (5th Cir., 1970)." *Sindermann v. Perry*, 5 Cir., 1970, 430 F. 2d 939, 943. Despite the material dispute existing the District Court upheld the 1963 contract and denied the validity of the 1970 contract. While we intimate no opinion on the merits of the case, it is clear that the stipulated facts do not sustain the conclusion of the Trial Court in respect to either contract.

The granting of a motion for summary judgment is the exception rather than the rule, *Lovable Company v. Honeywell, Inc.*, 5 Cir., 1970, 431 F. 2d 668, 670, and the exception may be utilized only where there is no triable issue, that is, where both of the requisites of Fed. R. Civ. P. 56(c) have been met — where there remains no genuine issue as to a material fact and the moving party is entitled to judgment as a matter of law. Notwithstanding that both parties have moved for summary judgment, neither of these requirements has been met.

REVERSED AND REMANDED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-3144

CITY OF CRYSTAL CITY,
Plaintiff-Appelle

versus

DEL MONTE CORPORATION d/b/a DEL MONT
FOODS, INC.,
Defendant-Appellan

Appeal from the United States District Court for th
Western District of Texas

ON PETITION FOR REHEARING AND PETITIO
FOR REHEARING EN BANC
(Opinion May 24, 1972, 5 Cir., 1972, ____ F.2d ___).

(June 26, 1972)

Before AINSWORTH, GODBOLD and MORGAN,
Circuit Judges.

PER CURIAM: The Petition for Rehearing is DE
NIED and no member of this panel nor Judge in regu
lar active service on the Court having requested tha
the Court be polled on rehearing en banc, (Rule 3
Federal Rules of Appellate Procedure; Local Fifth Cir
cuit Rule 12) the Petition for Rehearing En Banc is
DENIED.